

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

DEAN & FLYNN, INC., et al.,	)	
	)	
Plaintiffs	)	
	)	
v.	)	Civil No. 97-0149-B
	)	
DIVERSIFIED COMMUNICATIONS,	)	
	)	
Defendant	)	

***RECOMMENDED DECISION***

This is an action alleging defamation and commercial disparagement by Plaintiffs Dean & Flynn, Inc., and Uptown Festivals, operators of the carnival at the Bangor State Fair, and Holly Cote, an employee at the fair, against Defendant Diversified Communications, which operates a local television station. Plaintiffs complain about a particular news story broadcast on Defendant's station that reported there was an increase in inquiries at the local public health clinic from people concerned they might have contracted sexually transmitted diseases ["STDs"] from persons working at the fair. The report also indicated employees of the clinic have spent extra work hours trying to track down fair workers who might have contracted STDs.

Pending before the Court is Defendant's Motion for Summary Judgment on both counts of Plaintiffs' Complaint. In their response to the Motion for Summary Judgment, Plaintiffs indicate they do not wish to pursue their claim for commercial disparagement in count II of the Complaint.

In addition, Plaintiff Uptown Festivals does not appear to be participating in the objection to summary judgment. The record reflects an indication by Plaintiff Uptown Festivals that it would seek to voluntarily dismiss its claims, but no such motion has ever been filed. Ordinarily, in this

District, a party's failure to timely respond to a motion is generally construed to waive objection to the motion. D. Me. R. 7(c). However, the Federal Rules of Civil Procedure require us to examine the merits of a motion for summary judgment regardless of the opposing party's failure to object. *FDIC v. Bandon Assoc.*, 780 F. Supp. 60, 62 (D. Me. 1991). Accordingly, we will address the Motion for Summary Judgment as it relates to both Corporate Defendants.

### ***Discussion***

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "A material fact is one which has the 'potential to affect the outcome of the suit under applicable law.'" *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993)). The Court views the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993).

However, summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party has presented evidence of the absence of a genuine issue, the nonmoving party must respond by "placing at least one material fact in dispute." *Anchor Properties*, 13 F.3d at 30 (citing *Darr v. Muratore*, 8 F.3d 854, 859 (1st Cir. 1993)).

**A. Whether the Corporate Plaintiffs were defamed by the statements at issue.**

Defendant argues that the Corporate Plaintiffs could not be defamed by statements which might otherwise be defamatory to their employees. Def. Memo. at 3-4. The Court can find no authority in this circuit directly on point, and Defendant has cited none. However, at least one other court has held that "[a] corporation may be defamed by words directed at its employees if they are such as to discredit the method by which its business is conducted." *Neiman-Marcus Co. v. Lait*, 107 F.Supp. 96, 101 (S.D.N.Y. 1952) (citation omitted). As the rule was applied in that case, the court concluded "it cannot be said as a matter of law that a corporation cannot be damaged in a business way by a publication that it employs seriously undesirable personnel." *Id.*

At issue, then, is whether Plaintiffs have "placed at least one material fact in dispute" relative to the question whether they were harmed in a business sense by the statements about their employees. Plaintiffs' arguments to the effect that a reasonable viewer would think less highly of an employer corporation after the broadcast at issue are not helpful in this regard. In short, Plaintiffs have offered no evidence that they suffered harm as a result of the broadcast. Summary judgment is appropriately entered in favor of Defendant as against the Corporate Defendants on Count I of the Complaint.

**B. Whether the statements were "of and concerning" the Corporate Plaintiffs.**

Defendant also argues that the statements at issue were not "of and concerning" the Corporate Plaintiffs, which Plaintiffs would be required to prove even if there were evidence of harm to their reputations in the community. "[O]ne who is injured by the libel of another has no right of action." *Church of Scientology v. Flynn*, 578 F. Supp. 266, 268 (D. Mass. 1984). Plaintiffs correctly note that the focus of the analysis is on "the understanding of the audience, not the intention of the defamer."

Pltf. Memo. at 14. Indeed, in this state, "unless a defamation plaintiff introduces some evidence linking him to the publication, he fails to establish an essential element of a libel action." *Hudson v. Guy Gannett Broadcasting*, 521 A.2d 714, 717 (Me. 1987). This "link" must, as a matter of law, have occurred in the mind of at least one recipient of the message. *Id.* As stated by this Court:

Although it is not necessary that the publication on its face mention the plaintiff by name, if its application to the plaintiff depends upon extrinsic circumstances, he must show that it was actually understood as referring to him. Restatement of Torts § 564 (1938); Prosser, *The Law of Torts*, 767 (3d ed. 1964). In this respect, the test is neither the intent of the author nor the recognition of the plaintiff himself that the article is about him, but rather the reasonable understanding of the recipient of the communication.

*Robinson v. Guy Gannet Pub.*, 297 F. Supp. 722, 726 (D. Me. 1969). In *Robinson*, plaintiffs' claims were dismissed because plaintiffs "offered no proof that any person who read the article and saw the picture understood that the article referred to plaintiffs or identified the items in the picture as plaintiffs' products." *Id.*

Plaintiffs assert that there must certainly be an issue of fact "as to whether the broadcast, accompanied by visuals of the midway and carnival employees, *could be* construed as 'of and concerning' the operator of the carnival." Pltf. Memo. at 14 (emphasis added). Plaintiffs misperceive their burden in this respect. This court's apparent willingness in *Robinson* to accept evidence showing that a reasonable reader *could have* understood the material to refer to plaintiff was rejected by the Maine Law Court. *Id.* at 717 ("With the focus on the recipient's understanding, the plaintiff logically seeks to establish at least one person's understanding of the broadcast as referring to the plaintiff in order to avoid a summary judgment on the 'of and concerning' issue."). Plaintiffs have offered no evidence that any viewer connected the broadcast to either of the Corporate

Plaintiffs. Accordingly, summary judgment on Count I as against the Corporate Plaintiffs is appropriately entered on this ground as well.

**C. Whether the statements were "of and concerning" Holly Cote.**

Plaintiff Holly Cote has also failed to produce evidence that even one viewer of the allegedly defamatory broadcast connected the message to her personally. Her claim rests on the alternative theory of "group defamation." Under this theory, Plaintiff must show "either that the group or class is so small that the statements may reasonably be understood to refer to each member, or else that the circumstances are such that the material may reasonably be understood to refer to him personally." *Robinson*, 297 F. Supp. at 726 (citation omitted).<sup>1</sup> Plaintiff appropriately relies upon the second prong, as the "group" to which she belongs numbers at least 76 people. *See*, Restatement (Second) of Torts § 564A cmt. b (noting that groups larger than 25 are generally not considered small enough to permit recovery under the first prong).

Plaintiff Cote's claim fails in any event. The general rule is that there is no recovery for individual members of large groups. Restatement (Second) of Torts § 564A cmt. a. The exception articulated by the court in *Robinson*, and in the Restatement, that permits recovery when circumstances indicate a particular reference to the plaintiff "is designed to apply only whether a plaintiff can satisfy a jury that the words referred *solely or especially* to himself." *Neiman-Marcus v. Lait*, 13 F.R.D. 311, 316 (S.D.N.Y. 1952) (emphasis added). If this were not the case, the exception would swallow the general rule; each member of the group would be entitled to recover

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<sup>1</sup> It is by no means clear whether the Maine Law Court's rejection of the "reasonable" or "hypothetical" viewer in *Hudson* would also apply to the group defamation theory upon which Plaintiff relies. There is no need to resolve the question in this case.

simply by showing that a recipient of the defamatory communication was aware of his or her membership in the group.

Plaintiff Cote was shown during the broadcast, from the rear, operating a ride at the Bangor State Fair. She was one of several employees appearing in footage of the fair during the broadcast. The text of the report did not in any way point to a particular employee, whether Plaintiff or anyone else. The evidence is insufficient as a matter of law to establish that the report actually referred "solely or especially" to Plaintiff Cote.

Plaintiff Cote's argument is not only that Defendant implied she had a venereal disease by showing her photograph as a visual during the broadcast. In Plaintiff's view, the "more serious defamation" was Plaintiff's depiction "as one of a group of unsavory characters." As noted previously, mere membership in the group is insufficient to satisfy the exception articulated in the Restatement. Summary Judgment is appropriately entered in Defendant's favor as against Plaintiff Cote.

### ***Conclusion***

For the foregoing reasons, I hereby recommend the Court GRANT Defendant's Motion for Summary Judgment (Docket No. 24) in its entirety.

### **NOTICE**

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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Eugene W. Beaulieu  
United States Magistrate Judge

Dated on April 21, 1998.